United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

TO BE ARGUED
BY J. DANIEL SAGARIN

75-7115

B

P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7115

FIREBIRD SOCIETY, ET AL

Plaintiffs - Appellees

V.

MEMBERS OF THE BOARD OF FIRE COMMISSIONERS, CITY OF NEW HAVEN, ET AL

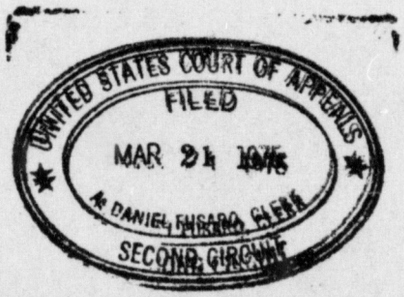
Defendants - Appellees

THE FIREFIGHTERS COMMITTEE TO PRESERVE CIVIL SERVICE, ET AL

Intervenors - Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPLYING INTERVENORS-APPELLANTS BRIEF



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Rule 19.

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

As amended Feb. 28, 1966, eff. July 1, 1966.

1949 Amendment

The amendment effective October 20, 1949, substituted the reference to "Title 28, U.S.C., §§ 1335, 1397, and 2361," at the end of the first sentence of paragraph (2), in lieu of the reference to "Section 24(26) of the Judicial Code, as amended, U.S.C., Title 28, § 41(26)." The amendment also substituted the words "those provisions" in the second sentence of paragraph (2) for the words "that section."

Rule 23.

CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings

include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclud him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the pre-

Rule 24.

INTERVENTION

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

Hi

References In Text. The Sub... Activities Control Act of 1950, refer... in subsec. (f), is classified princip... subchapter I of chapter 23 of Ti... War and National Defense.

1972 Amendment. Subsec. (a) Pub.L. 92-261, § 8(a), added "or ... cants for employment" following employees".

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I. The District Court Erred In Denying

ISSUES PRESENTED

1. Should Nonminority Public Servants Be Made Parties To Equal Employment Opportunity Litigation Seeking To Abrogate Their Contractual, Statutory And Constitutional Employment Rights?

2. Do Nonminority Public Servants Have A Right To Be Heard Prior To the Finalization Of Any Equal Employment Opportunity Litigation Settlement Adversely Affecting And Changing Their Employment Status and Opportunities?

3. Did The District Court Err In Denying The Application To Intervene?

   A. Do Appellants Have An "Interest" In Litigation Affecting Their Employment Expectations, Rights Status, Opportunities And Conditions Of Employment?

   B. Was The Application To Intervene Timely?

   C. Were Appellants Adequately Represented By Other Parties All Of Whom Had Interests Conflicting With Appellants?

4. Does Not 703(j) Of Title VII Of The Civil Rights Act Of 1964 Prohibit Quota Type Remedies At The Promotional Level? At The Hiring Level?

STATEMENT OF THE CASE

This is an appeal from the denial of appellants' Application To Intervene as defendants and cross-claimants (46A-50A). This case proceeded in an unusual manner from the filing of the Complaint on October 5, 1973 through the filing of the Court Order of August 30, 1974 (38A-45A) which prompted the Application To Intervene.

The action, brought as a class action on behalf of blacks and Hispanics, (referred to in the Complaint collectively as minorities) sought injunctive and monetary relief to remedy what it claimed to be discrimination in hiring and promotions within the New Haven Department of Fire Services.

The plaintiffs were the Firebird Society of New Haven, Inc., an organization of black members of the New Haven Fire Department, and certain named blacks who are either members of the Department seeking promotion, or black persons who had applied and failed the entrance examination, who had been rejected appointment to the New Haven Department of Fire Services, or were prepared, ready, willing and able to apply for a job in the Department (11A-12A).

The named defendants were the Members of the New Haven Board of Fire Commissioners and the Members of the New Haven Civil Service Commission, the Chief of the New Haven Department of Fire Services, and the Mayor of the City of New Haven (12A). None of the applying intervenors were named as defendants in the action.

In the Complaint plaintiffs sought a temporary injunction in effect enjoining and restraining any appointments to or promotions within the Department and permanent injunctions requiring quota promotions only for those persons within plaintiffs'class, a revision of the system of promotion and hiring, a granting of seniority to plaintiffs and members of their class back to the date they first applied for a position and the award of one million dollar actual and one million dollar punitive damages.

A temporary restraining order was entered ex parte on October 16, 1974 without a factual hearing. A preliminary injunction was apparently thereafter agreed to. On October 29, 1974 the preliminary injunction freezing all appointments and promot-

ions was continued until further order of the Court and as a practical matter continued throughout the litigation with certain exceptions.

On December 5, 1973 the first of the Orders "not agreed to but acquiesced to by all parties" (29A) was entered. The order purportedly covered agreement upon recruitment, hiring, promotions, time and grade, damages, costs and continuing jurisdiction of the court. On that same date a second part of that Order which was sealed until the Order of August 30, 1974 was also entered but by order of the court a second, and perhaps the most crucial portion of the in camera agreement reached, was sealed and withheld from public disclosure (36A). That portion clearly related to an agreement for quota promotions to the rank of lieutenant, and thereafter to the rank of captain. No adequate explanation other than a desire to prevent applicants and members of their class from learning of the agreement has ever been offered for the sealing of this portion of the Order of December 5, 1973.

On December 5, 1973, although no motion appears in the file, Attorney W. Paul Flynn apparently orally moved to intervene in

chambers on behalf of several named firefighters whose promotions already approved were the subject of the temporary injunction. There is no application in the file.

On December 10, 1973 the City of New Haven was made a party defendant to the case and service was made upon City Counsel in chambers.

Following the December Order an examination for promotion to the rank of lieutenant specially designed by a University of Connecticut professor was held (89A). The results of that examination disclosed that the blacks who took the exam did poorly (97A) and there were not seven who fairly passed the exam. The failure of the blacks to perform well on the examination apparently caused the litigation to begin to be reactivated still with the December 5, 1973 Order sealed.

On May 21, 1973 the Court issued an Order enjoining all parties or officers from disclosing to any persons any material relating to any individuals examination score, test rating, efficiency rating, standing on promotion lists, and that all copies of examinations and efficiency rating scores and promotion lists presently under control of any party or any said

party's officers should forthwith be turned over to counsel for that party (document number 19). On May 22, 1973 defendants filed an answer (document number 20). Depositions were noticed (document number 26) but apparently never held, and on August 30, 1974 the Court issued its Order, again agreed to but not acquiesced in by all of the parties to the suit in order to end the litigation (38A). The Order for the first time publicly disclosed an agreement covering not only quota hiring relief but also quota promotional relief. The Court ordered promotions to the rank of lieutenant to be made from a list attached to the Order. In essence, the list slotted in blacks who had not otherwise earned those positions on the examinations in the fourth, seventh, tenth, thirteenth, sixteenth, nineteenth and twenty-second slots (142A). Indeed, most of those slotted in had not even passed the examination (97A-98A).

On September 20, 1974 appellants filed the Motion To Intervene to reopen the Order or August 30, 1974 to extend time to file an appeal from the Order of August 30th. An Order To Show Cause why the Motion should not be granted was issued and the hearing

was held on October 1, 1974. At the hearing no evidence was offered because of the time pressures on the court but it was agreed that for purposes of the motions the court would accept appellants' offers of proof to be submitted and would either accept those factual representations as true or would hear testimony on the matter (199A).

Offers Of Proof were filed (83A-104A) and the Court on February 4, 1975 (129A-148A) denied the motions. We believe he Court ignored the Offers Of Proof contrary to the agreement in open court in reaching this decision as we will point out later on. A timely Notice Of Appeal was filed.

STATEMENT OF FACTS

Since we believe, as we have pointed out, that the facts upon which this motion must be judged must come from the offers of proof (199A) and since they are set forth in full in the Appendix (83A-104A) we shall here refer to only some of those facts which we believe the District Court clearly ignored or was in error about in forming the basis for its ruling.

Appellant Intervenors.

The corporate intervenor is a nonprofit Connecticut corporation which was organized in September of 1974 whose charter purpose was, prompted by the Court's Order, to preserve a system of appointments to and promotions within municipal departments based soley on merit and devoid of considerations of race, religion, creed or political consideration. The great percentage of non-minority firefighters in New Haven have joined the organization and have contributed to it (124A). In addition, there are several named individuals who

were currently on the lieutenants list affected by the Court's Order and other individuals of varying ranks in the Department. All sought to intervene individually on behalf of themselves and all others similarly situated. In effect they sought to represent the non-minorities in an effort to have a voice in any order which would affect their future in the New Haven Department of Fire Services (57A). Acerra, Cassista, Cleary, Luycks and Sondergaard were all persons on the lieutenant list who would have received higher ranking but for the provisions slotting in the minorities above them (84A). The intervenors did not have proper notice of the action and should have been named as parties to begin with (84A-85A). But the only attempted effort to notify individuals of the pendency of the law suit was contained in a copy of a notice (204A) which was sent to the firehouses to be posted on the bulletin boards. The notice did not even contain the entire complaint (204A). The posting of such notice to the extent that any were posted, and there was no evidence that there were any posted, is not a method capable of reaching the vast majority of firefighters for several reasons, including the following.

Firefighters work different schedules often having several days off in a row during which old notices are covered over or taken off the Bulletin Board. Many firefighters do not read the Bulletin Board, important notices are brought to the attention of the firefighters by reading the same at roll call and this notice never was read at any roll call (86A).

It was the understanding of all the individual intervenors that all that was being sought in connection with any settlement of the pending law suit was the institution of job validated examinations, a goal with which the intervenors agreed. That information was based in part upon a statement of the president of the Firebird Society at a union meeting that the Firebirds were seeking only non-culturally biased competitive examinations (86A). The intervenors had no way in finding out the terms and conditions of that sealed Order because the parties to it were enjoined from disclos-

ing the terms and conditions of that Order by the Court (36A). If the Order had been publicized and had not been kept secret the intervenors would promptly have attempted to intervene to oppose any plan contemplating promotions or appointments based on race (85A).

The intervenors were prevented from intervening by their lack of knowledge caused by the delivered actions of the Court and the parties to the case (85A). The list attached to the Order of the Court of August 30, 1974 in which minority members have been slotted in does not reflect the promotional merit of the persons on the list. This was so despite the fact that the examination from which the list was compiled was job related and one doing better on the exam could reasonably be expected to do better on the job (87A). Performance on that job is important, not only to the morale of the Department, but indeed to the very health and safety to the members of the Department (87A). A less qualified lieutenant might make a fatal error in judgment affecting the lives and safeties of the intervenors and the class they purport to

represent as well as the citizens of New Haven (87A).

Since the City of New Haven has the address of all of the members of the Department of Fire Services the plaintiffs or the defendants could easily have notified by registered mail all of the applying intervenors and the members of their class of this suit or at least of the proposed settlement so that any member of the Department of Fire Services would have had an opportunity to intervene in the action if he saw fit (87A).

The intervenors further offered to prove that as the sealing of the Order of December of 1973 indicates the entire course of the proceedings was designed to prevent knowledge of the settlement, namely to prevent the intervenors and the class they seek to represent from understanding what the parties were doing. The reason for secrecy was the fact that the parties to the litigation knew the intervenors would oppose the Order and sought to exclude them from consideration in the settlement process. The intervenors were not consulted either individually or as a group in reaching the proposed settlement which was ultimately

implemented in the Court's Order of August 30, 1974. There is no adequate explanation for the sealing of the December 1973 Order (80A). Attorney W. Paul Flynn, to the extent he was permitted to intervene, did not represent any of the intervenors or any of their class they seek to represent on their behalf. Contrary to the District Court's assumption, Mr. Flynn neither represented the Union (105A, 107A), nor did the Union officials participate in any significant manner in the settlement discussions leading up to the August 30, 1974 Order. Indeed, the president and secretary/treasurer of the local Union were not aware of any promotional Order until August 29, 1974.

Moreover, the efficiency rating system which counted for forty-five points in the rating was applied in this case in a reversely discriminatory manner against non-minorities since all of the minorities were given forty-five ratings regardless of whether or not they earned the same (93A). Despite the existence of the December 1973 Order there were public denials of the use of two lists for promotions to the rank of lieutenant (94A). The Order of the Court violates the collective bargaining agreement, nondiscrimination clause, the Charter of

the City of New Haven, the Civil Service Rules and is contrary to the legitimate expectations of the intervenors and the class they seek to represent (94A-95A).

I The District Court Erred In Denying The Application To Intervene

Introduction

The overriding concern of this appeal is the delineation of the rights of nonminority public servants, here firefighters, in litigation seeking to abrogate their constitutional, statutory, and collective bargaining employment expectations. The issue is one which has to date not been carefully considered by any court in a reported decision. We believe the procedural law of Equal Employment Opportunity suits should require all nonminorities potentially affected by such cases to be formally notified and afforded an opportunity to intervene or preferably to be named as parties under Rule 19 as class defendants under Rule 23.

The nonminorities are in our view necessary parties without whom there cannot be a just adjudication. This kind of litigation is by definition racially divisive since its purpose is to categorize individuals by race and to segregate them in pursuit of common economic goals. When court orders instituting racially separate procedures are the result of in camera, sealed and secret proceedings, the wounds of discrimination against the nonminorities are aggravated by the salt of nonparticipation. The resultant scars are deeper, longer lasting, and unjustifiable.

Strict adherence to the rules and open, not closed, hearings are called for. They were not here present.

A. Appellants Have An Interest In The Proceedings.

Denying the Application To Intervene the District Court held (1) the applicants had no "interest" in the subject matter of the action (145A); (2) the application was untimely (146A-147A); and (3) the applicants were adequately represented by the existing parties and the intervenors (14[illegible]. In reaching these positions the Court relied on factual assumptions which were at odds with our offers of proof[1/] and thus in contravention of the ground rules set by the Court at the hearing.[2/]

Nonetheless assuming the lower court's facts to be correct, its denial of the application was erroneous. To the extent

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1) Among the significant disputed facts are (1) the role of the Union and Attorney W. Paul Flynn (see p. 8 infra) (2) the effectiveness of the Bulletin Board posting, and (3) the level awareness of the intervenors. And see Statement of Fact , supra p. 7.

2) At the very least to the extent those factual underpinnings are required to support the District Court's decision the case should be remanded for a hearing.

the decision was discretionary, (which we do not believe it was) that discretion was abused.

Rule 24(a)[3/] allows for intervention by a person so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. In Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission, 482 F2d 1333, 1341 (2 Cir. 1973) this Court recognized the important interest which nonminorities had in the outcome of suits of this like. There the Court found that the district court's quota relief order at the promotional level constituted an abuse of discretion although it "gingerly"

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3) Federal Rules of Civil Procedure 24(a) provides Upon timely application anyone shall be permitted to intervene in an action...or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

approved the relief at the initial hiring stage.[4] It stated,

> "While past exclusionary hiring examinations do justify the quota remedy on entrance, there is no justification in our view for extending the remedy to higher ranks...While this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement, only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish social attitudes...We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted. We would strike from the judgment below therefore all quota requirements above the rank of patrolmen..."

Significantly the importance of intervention is apparent from the Guardians case for there it was the intervenors who were members of the Bridgeport Police

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4) The different treatment of the hiring and promotional relief aspects is one well supported by the other circuits. See infra p.34.

It may well be an appropriate approach here. Namely, to permit intervention on the promotional issue, but to leave the hiring order in effect.

Department of varying ranks who carried the ball.

Thus we find it difficult to believe that those most immediately affected by the relief order from a direct economic as well as safety point of view can be said to be without an interest. We shall later discuss the interest as it applies to intervention, but here we consider whether appellants should have been parties at the start.

1. Appellants Should Have Been Formal Parties To Litigation From The Start

We believe, as we argued below (124A-125A) that sound policy requires persons in appellants' position to be named in the first instance either under Rule 19 as persons needed for a just adjudication or pursuant to Rule 23 as class defendants. Taken together Rules 19, 23, and 24 express the intent of the Federal Rules that "interested" persons or persons affected by the outcome of the litigation be participants. The language in Rule 19(b)(2) and 24(a)(2) is virtually identical. Moreover, both rules are, of course, subject to Rule 23 covering class proceedings. 3A Moore, Federal Practice 2121 (1974). Thus the test of "an interest" under all three rules would appear to be the same. Atlantis Dev. Corp. v. United States 379 F.2d 818 (5 Cir. 1967); 3A Moore, supra at pocket party 57. The criteria for 19(a) and (b) applicability follow Shields v. Barrow

17 How. 130, 139, 15 L.ed 158 (1854). The Supreme Court there defined indispensable persons as those who "not only have an interest in the controversy, but are interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Appellants meet this criteria. Focusing on the potential effect of the promotional aspect of the August 30, 1974 Order, it is clear that appellants are the persons most directly affected by the Order. If the Order is imp'emented it is the individual appellants whose promotion to the rank of lieutenant will be denied or delayed. The consequent economic and emotional losses are directly inflicted upon them.

If they are not permitted, indeed required, to be parties what is their status? When do they have their day in Court?

They claim, inter alia:

1. The examination from which the promotional list was compiled was job related (87A);

2. That a less qualified lieutenant might make a fatal error in judgment affecting their lives and safety (87A);

3. The efficiency rating system was applied in a reversely discriminatory manner (93A);

4. Reverse discrimination will have a serious detrimental effect on the morale of the members of the department (87A, 157A); and

5. That they were intentionally denied access to information concerning the nature, goals and progress of the suit (85A, 87A, 88A, 89A, 91A, 92A, 93A-94A).

If those claims are not here heard will the applicants be free to pursue their remedies elsewhere, such as separate litigation in the State Court or a separate suit here?[4/] At

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4) Indeed following the denial of the application the corporate appellant and others filed an action in the Connecticut Superior Court seeking an injunction against the City of New Haven to prevent implementation of the plan which violates the collective bargaining agreement (94A), the Charter of the City of New Haven (94A), and the Civil Service Rules and Regulations (95A) as well as Federal and State Constitutions. Predictably plaintiffs have filed a motion to restrain and enjoin the State Court proceedings which raises serious and significant questions of Federal-State conuity under the Anti-Injunction Statute, 28 U.S.C. 2283. As it happened the trial court ruling on the Motion To Stay obviated any need to rule on lawsuit injunction, but the procedure points up the difficulties created. Cf. Coffey v. Braddy, 342 F. Supp. 116 (M. D. Fla. 1971).

least one. Court has suggested those avenues are open. Harper v. Kloster, 486 F. 2d 1134 (4 Cir. 1973). There the Fourth Circuit considered an Application To Intervene by out of city residents to contest a portion of a Court order entered after trial restricting jobs to city residents. It held the application untimely, but offered the possibility of a separate suit on the issue involved. Applied here that reasoning would open the entire issues of this litigation. Cf. Proposed Cross-Claim (51A-57A). As a matter of policy then appellants should have been named persons needed for a just adjudication or class defendants in the first instance if their interest meets the Shields v. Barrow test. The nature of that "interest" is more specifically discussed immediately below. Infra. p. 22.

Parties have been held indispensable because their "rights are so entangled with one another that it is practically impossible in the decree to protect those that are absent". Roos v. Texas Co. 23 F. 2d 171 (2 Cir. 1927) or because the decree was of "immediate concern to them". Texas v. Interstate Comm. 258 U.S. 158, 42 S. Ct. 261 (1921) (employers and employees affected by suit to declare rulings on wages unconstitutional held indespensable.) Appellants meet these

criteria.

2. Appellants' Interest Is Real And Sufficient To Require Intervention.

The lower Court's determination that applicants lacked a definable interest contravenes not only the Guardians decision, supra, but the sound policies of unitary adjudication contained in the Federal Rules. The determination of an interest is a pragmatic one. 3A Moore, supra at 2229, see Washington v. United States, 87 F2d 421, 427-428 (9 Cir. 1936).

Rather than taking the pragmatic approach the District Court focused on the status of the particular named individuals (143A). Had it not, it would have recognized that if Blacks have an "interest" sufficient to justify a class action in alleged antiminority discriminations in the hiring and promotion procedures, then Whites surely have at least the same interest in protecting themselves, their jobs, and their livelihoods from reversely discriminatory procedures. Had it not, it would not have overlooked the fact that intervention was sought on behalf of a class of nonminorities (see particularly paragraph three of the Proposed Cross-Complaint, 53A-54A, and Motion To Intervene, 46A).

Even on the District Court's own analysis it was wrong.

Each of the individual applicants has embarked upon a fire career with the expectation of advancement. Cf. Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission at 1341 The privates and other nonminorities will be either denied immediate appointment or delayed in future appointments to the

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5) The F.C.P.C.S. is a proper organization to raise the issue sought to be raised by the application for intervention and the cross complaint. Several courts have held "that an organization whose members are injured may represent those members in a proceeding for a judicial review". Sierra Club v. Morton, 405 U.S. 27, (1972); NAACP v. Button, 371 U.S. 415, 428 (1963). This is especially true when representation of the interest is the primary reason for the organizations existence. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920, 937 (2 Cir. 1968); U.S. v. Board of School Commissioners-Indianapolis, 466 F.2d 573, 576 (7 Cir. 1972).

6) At least one Court has suggested that minority representation in the Fire Department is less important then in a police department is Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa.). This Court has noted the importance of the visibility factor in a police department. Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra at 1341.

rank of lieutenant. To the extent seven blacks are slotted into positions they have not earned those positions are foreclosed to better qualified whites solely by reason of race. The current lieutenants face delay in opportunities for promotion to captain (para. 6(c), p. 41A). Moreover, a Sword of Damocles hangs over that captain's exams. (Para. 6(e) 41A.) All of the intervenors affected by the time in grade changes (42A).

Beyond the above each of the intervenors has a direct and important interest in maintaining the morale of the Department and in being led by the most qualified personnel (157A). Thus the Court erred in holding the intervenors' lacked a definable interest.[7/]

B. Under The Circumstances Of This Case The Application Was Timely

1. Intervention After Judgment Is Permitted.

Intervention pursuant to Rule 24 must be timely. Of

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7) Even if intervention was not as of right under 24(a)(2), the above interest and the circumstances surrounding the issuance of the August 30, 1974 Order indicate denial of permissive intervention was an abuse of discretion.

course there is no timeliness barrier if as we have argued our interest required us to be formally served. However, if Rule 24 intervention is all that is open, the Application here was timely and the District Court judge erred in finding it not to be (Ruling, 146A). Timeliness is to be determined from all of the circumstances of case, Kozak v. Wells 278 F.2d 104, 109 (6 Cir. 1960); Clark v. Sandusky, 205 F.2d 915, 918 (7 Cir. 1954); 4 Moore, Federal Practice 2413. Wolpe v. Poretsky, 144 F. 2d 505, 508 cert. den. 323 U.S. 777; Cuthill v. Ortman Miller, 216 F. 2d 336, 338 (7 Cir.); Pelligrino v. Nesbit , 203 F. 2d 463, 465; 37 ALR 2d 1296; and cf. Turner v. Willard, 157 F. Supp. 451 (SDNY 1957) (where intervention to reopen a judgment was denied but allowed for purpose of taking an appeal) It has been allowed at various stages of the proceedings and for various purposes. In U.S. v. School Dist. Okla. 367 F. Supp. 198, 201 (D. Okla. 1973), intervention was permitted on certain conditions even after a full and plenary hearing on the merits. A fortiori here where there has been no such hearing or notice, it should be allowed. In U.S. v.

Board of School Commissioners of Indianapolis, 466 F.2d 573, 576 (7 Cir. 1972), the Court of Appeals reversed the trial judge's final order of denial of intervention conditioning the same upon appellants' adoption of all previous adjudications.

The circumstances here including the vital interest in the proceedings of appellants, the failure of the parties to follow formal notification procedures, the fact that the case proceeded behind closed doors and by sealed proceedings (discussed below) and the willingness of appellants to proceed expeditiously (it is, of course, in their interest to do so) all indicate the application was timely.

2. The Chambers Conferences Which Led To The August 30, 1974 Order Were Designed To Prevent Appellants From Learning Of the Promotion Order

Throughout our offers of proof we have pointed out that the entire settlement proceedings were designed and implemented in a manner not to inform appellants of the settlement procedures, but to keep the most volatile aspects from their knowledge. (Compare Unsealed Order of

December 5, 29A, with Sealed Order, 56A).

Neither the lower Court nor the parties ever have offered an adequate explanation for the orders of secrecy. The obvious concern was that if the quota promotions were disclosed, appellants would seek to intervene to prevent their implementation.

Moreover, the release of a partial order of December 5 could only lead appellants to believe that the litigation had been disposed of with an agreement for job validated exams, a goal with which they agreed (86A and see para. 33, p. 94A). This

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misimpression was bolstered by misstatements of the president of the Firebirds (86A) and by public denials that there would be two separate lists for promotions, one black, one white (93A-94A).

Indeed the District Court judge acknowledges that all chambers conferences were marked by "off the record" discussions (137A), but his reliance on media leaks as a source of information is not only unjudicious, but also erroneous. Appellants had no knowledge of the promotional settlement (see Offer Of Proof, para. 14, 87A; para. 17, 87A-88A; para. 22, 89A).

Thus appellants sought to intervene within ten days of the first moment they learned of promotional relief. Under the circumstances of this case it seems timely.

3. The Cases Relied Upon By The District Court Support Appellants' Position

In holding the Application untimely the lower Court inappropriately relied on several cases such as United States v. Blue Chip Stamp Company, 272 F. Supp. 432, 435-444 (D.C. Cal. 1967) aff'd sub nom Thrifty Shoppers v. United States, 389 U.S. 580 (1968) (146A). We believe that the Blue Chip case

supports our position on timeliness. In Blue Chip the Court was dealing with an application of certain petitioners to intervene under Rule 24(a) of the Federal Rules of Civil Procedure or for permission to intervene under Rule 24(b) and to vacate a consent decree which had been entered in an antitrust case. The petitioners there were seeking to intervene in a case which the government had originally filed charging the defendants with a violation of Sections 1 and 2 of the Sherman Act.

The history of the negotiations which led to the consent decree in that case stand in marked contrast to the procedures which led to the Court's Order of August 30, 1974 in this case.

There, when the negotiations were begun the government "afforded an opportunity to all defendants and to all others with an interest to participate in the negotiations, three separate consent decrees were proposed, each of which was lodged with the Court". (Id. at 433-434) In Order that interested parties might have time to study each proposed decree and to make known their views with respect to it, there was annexed to each decree a stipulation providing that all signatory parties consented to entry of the given decree after

thirty days unless the Government withdrew its consent during the thirty day period. Ibid.

Indeed, the first proposed consent decree was objected to and the Government subsequently withdrew its consent, a second consent decree was objected to and the Court sustained the objections. Finally, a third consent decree was proposed and the intervenors filed briefs in opposition as amici curiae. Against this background the Court, which recognized that "intervention may be allowed after a final judgment or decree if it is necessary to preserve some right..." found that the intervenors who had earlier participated in the proceedings could not now claim that their intervention was timely. Cf. 4 Moore Federal Practice, Section 24.13 (2 ed. 1973).

If the procedure followed in Blue Chip was here followed the intervenors would have been invited to intervene as formal parties. No settlement would have been reached without having provided them an opportunity to have been heard.

The intervenors' Application To Intervene also falls within the rule set down by the Supreme Court in Cascade Natural Gas Corporation v. El Paso Natural Gas Company, 87 S. Ct. 932 (1967).

There the Supreme Court reversed the District Court order denying on appellants the right to intervene an antitrust action brought by the United States against El Paso Natural Gas Company. The intervention was permitted not only after the institution of the case, but after the case had once been to the Supreme Court.

Intervention was specifically permitted in order to help fashion a remedy to protect the interests of the private and public intervenors. Here the merits of the case have never been heard. Obviously while petitioners seek to intervene to reopen the entire order there are a great number of middle grounds. The Court can permit petitioners to intervene solely to be heard and to deal with the promotional remedies. That would, of course, leave a major portion of the lawsuit finally adjudicated - that part dealing with the hiring procedures. The remaining litigation would, of course, be significantly shortened.

Another decision which the Court may reach is that applicants should be allowed to intervene to be heard on all remedies, assuming that there is agreement that past hiring practices did

not meet the standards of the Equal Employment Opportunity Act. In either event we are in little different position than the parties were in just prior to the entry of the August 30, 1974 Order. A strict time schedule can be established which would be adhered to by the parties for the remaining litigation.

4. The Initial Notice Was Not Sufficient To Deprive Appellants Of the Rights

The District Court and the plaintiffs appear to place great reliance on the supposed posting of a notice in the Fire Department concerning the lawsuit at the start of the litigation (204A). Aside from the fact that there is no proof that the notices were actually posted, it is clear that even if they were they were not adequate. (see Offer Of Proof, 86A and 119A). The posting of notices to the extent any notices were posted is not a method capable of reaching the vast majority of firefighters. Ibid.

How easy it would have been to send each fireman a registered letter! The cost would hardly have exceeded $50.00. If the posting of notices was intended to comply with Rule 19

or Rule 23, it did not. Notice should be the best practicable under all the circumstances including individual notice to all members who can be identified with reasonable effort, See 3B Moore, supra at 23-1157. Best notice here is with the United States mails. Too many formalities in this suit were dispensed with. The sloppy procedure that followed is the chief villain to whom the current "mishmash" can be attributed. At the very least, however, the attempt to notify, however abortive, belies the current claims of lack of interest and adequate representation.

C. Appellants Were Not Adequately Represented By Any Of the Parties

The Court held that appellants had been adequately represented (148A). Why then are we here? Who bargained away our rights? Who had an interest not to? 8/

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8) We have earlier alluded to the District Court's failure to abide by the representation that it would accept for purposes of the agreement our offers of proof. Nowhere is this failure more apparent than in dealing with the role played by Attorney W. Paul Flynn. Flynn did not represent the Union here or any of the appellants (22A, 112A) and see particularly 105A-109A clarifying the limited role and knowledge of Union officials. Thus although the Court may have felt or believed appellants were being represented by Flynn, they were not.

The inadequacy of the representation of the existing parties can be shown by the fact that all of the existing parties had conflicting interests which had to affect their judgment.

The City corporate counsel could not represent the interest of the intervenors, because, among other things, the City was faced with a complaint seeking award of millions of dollars of damages and thus the City had a direct pecuniary interest in acceding to at least some of the demands of the plaintiffs in this action in order to avoid a potential judgment against it.

Secondly, if there is a group of intervenors represented by Attorney W. Paul Flynn, those intervenors each had a direct and immediate interest in the settlement of the litigation without reaching its merits in that each of those persons purportedly represented Mr. Flynn was in direct line for an immediate promotion or appointment which was being restrained as a result of a preliminary injunction entered into this case.

Thus, each of those individuals in considering any proposed settlement had a conflicting interest to weigh against the impact of that settlement.

These facts preclude a finding of adequate representation. 3B Moore, supra. p. 23-184.

II The Quota Relief Ordered Is Unprecedented, Unconstitutional And Violative of Section 703(j) of Title VII

Although probably beyond the scope of this appeal we think it appropriate here to argue the District Court was wrong in its opinion that the remedy here ordered was not forbidden by the Constitution or Title VII of the Civil Rights Act of 1964(145A).

While several courts have gingerly, if not enthusiastically approved quota remedies[9] at the hiring level Carter v. Gallagher 452 F. 2d 315 (8 Cir. 1971) on rehearing (en banc 452 F. 2d at 327; Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission, supra at 1483; Boston Chapter NAACP v. Beechier , 504 F. 2d 1017 (1 Cir. 1974); Morrow v. Cresler, 491 F. 2d 1053 (5 Cir. 1974, en banc) (only after District Court relief not

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9) The District Court argued its color conscious relief was not a quota, but rather interim priority relief (145A). A quota is a quota is a quota. The fact remains that a designated number of persons will be hired or promoted because they are black. That those persons have been identified attests only to the efficiency of the challenged systems, but does not change the character of the relief. The District judge in the Guardians case recognized the distruction the lower Court here made to be illusory. Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 354 F. Supp. 778. 798 (D. Conn. 1968).

involving quotas, see Morrow v. Crisler, 479 F. 2d 960 (5 Cir. 1973), was shown not to have been followed in good faith, Vulcan Society v. C.S.C., 490 F. 2d 387 (2 Cir. 1973) Commonwealth v. O'Neill, II, 473 F. 2d 1029 (3 Cir. 1973) reversing unanimously a promotional quota, the Courts have not approved color conscious relief at the promotional level. Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission,, supra; and note that in the above cited cases only relief at the hiring level was ordered. The Supreme Court has yet to rule even on the propriety of quota relief at the hiring level, but it is clear that the various Courts of Appeal have adopted a no quota policy as far as promotions are concerned. The underpinnings of this policy stated by this Court in the Guardians and quoted above, supra. p. 3, case are sound.

Moreover, returns are not yet final on the effect of 703(j) of Title VII even for hiring quotas. On its face, 703(j) appears to prohibit preferential treatment of any individual on account of racial imbalance in employment 42 U.S.C. 2000 e-2(j).

There are compelling reasons which require a strict interpretation of that section. See dissenting opinion of Judge Hays, Rios v. Enterprise Association Steamfitters Loc. 638, 501 F. 2d

622, 634-638 (2 Cir. 1974). In a well reasoned decision a California Superior Court judge recently wrote:

> "The vice of such a quota is that it would be subject to future fluctuations which would, again, have no specific bearing on the elimination of discrimination in employment practices. Racial quotas, generally, are viewed in our law with suspicion. They tend to freeze official conduct in the future by reference to yesterday's conditions. One need only look at racial proportions of 30 years ago and consider its impact on a racial employment quota, fixed at that time, to be alarmed at the future effect of restor to such devises. It must be remembered that quotas operate to exclude as well as include."

Hiatt v. City of Berkeley, Cal. Sup. (No. 453-459-2, Feb. 13, 1975).

We think Rios was wrongly decided and should not be followed by this panel but thatdecision need not now be made. If this matter is remanded and applicants are to be heard at the District Court, there will be time enough to raise these arguments.

CONCLUSION

The Ruling denying the Application To Intervene should be reversed; the case should be remanded with instructions that appellants should be permitted to intervene; the Order of August 30, 1974 should be set aside.

Intervenors-Appellants
F.C.P.C.S. ET AL

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent, postage prepaid, on this 21st day of March, 1975 to the following counsel of record:

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